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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHRISTOPHER L. LOWE ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN SUPPORT OF PETITIONERS FOR *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AMERICAN SOCIETY OF MAGAZINE EDITORS AMERICAN SOCIETY OF NEWSPAPER EDITORS ASSOCIATED PRESS MANAGING EDITORS THE MEDIA INSTITUTE NATIONAL NEWSPAPER ASSOCIATION THE NEWSLETTER ASSOCIATION NEWSPAPER GUILD NEW YORK FINANCIAL WRITERS ASSOCIATION SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

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BRIEF FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici curiae are ten organizations composed of individual and institutional members of the press. *Amici* are both large and small national news organizations that collectively represent a broad spectrum of working journalists, newspapers, magazines, newsletters, and others involved in the gathering and dissemination of financial and investment news to the public.

Specifically, *amici* are the following organizations: The American Society of Magazine Editors has 450 members who are chief and senior editors of consumer, trade, and farm magazines across the United States. The American Society of Newspaper Editors is a nationwide organization of more than 900 directing editors of daily newspapers, dedicated to improving the manner in which the journalism profession serves the American people. The Associated Press Managing Editors includes more than 600 editors of newspaper members of the Associated Press, which gathers news worldwide for dis-

semination to 1,350 newspapers and 3,300 broadcast stations around the world. The Media Institute is a nonprofit research organization which has published numerous reports on foreign and domestic communications policy and studies on broadcast coverage of economic news. The National Newspaper Association is a national organization of 5,500 newspapers, which is dedicated to preserving the constitutional guarantee of freedom of the press.

The Newsletter Association is an international trade association of 850 publishers of 2,500 newsletters and other specialized services which provide financial and other types of information. The Newspaper Guild is a trade union representing 40,000 editorial, advertising, circulation, business and other non-mechanical department employees of newspapers in the United States and Canada. The New York Financial Writers Association includes 350 reporters and editors dedicated to upholding the standards of business and financial journalists. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors devoted to protecting the First Amendment interests of the media. The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 28,000 people from every branch and rank of print and broadcast journalism. It is the largest organization of journalists in the United States.

Amici view the Second Circuit's decision in this case as a significant threat to the free dissemination of news about the financial markets and specific investment opportunities. *Amici* fear that, if this Court affirms the decision below, some financial news organizations will be permitted to publish freely and others will not. This would be out of keeping with our system of a free and independent press. The decision below would permit prior restraints of business publications without any showing of a direct, immediate, and irreparable harm to any vital governmental interest. It approves of censorship in the form of licensing and grants the government and the

courts the power—denied to them by the Constitution—to decide which financial publications are "bona fide." *Amici* believe, on the contrary, that the First Amendment permits any person freely to publish information about any aspect of the social, economic, or political life of our country, including financial trends, stock market predictions, and securities recommendations. Accordingly, *amici* submit this brief in support of petitioners.

Amici have received consent to file this brief from petitioners and from respondent. Their letters of consent have been filed with the Clerk of this Court.

STATEMENT

This case involves the constitutionality, under the First Amendment, of provisions of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* ("Advisers Act" or "Act"), that require all publishers, except publishers of so-called "bona fide" publications, to register with the Securities and Exchange Commission ("the Commission") in order to publish financial newsletters containing recommendations or reports concerning securities. The Commission may deny or revoke the registration of a publisher who is subject to one or more statutory disqualifications, including disqualification for violating the securities laws or for having been convicted of certain crimes during the preceding ten years. The Act allows the Commission to sue to enjoin publication by unlicensed publishers, or to bring criminal prosecutions against them.

Petitioner Christopher Lowe ("Lowe") is president of the three corporate petitioners, including Lowe Management Corporation ("Lowe Management"). Until 1981, Lowe Management was registered with the Commission under the Act and published investment advice and managed the funds of clients on a discretionary basis. In 1977 and 1978, Lowe was convicted in state court of two felonies and two misdemeanors related to this investment advisory business. On the basis of these convictions and Lowe Management's violation of certain provisions of the Act, the Commission revoked Lowe Management's

registration and barred Lowe from association with any investment adviser, pursuant to 15 U.S.C. §§ 80b-3(e) & (f).

Though petitioners were no longer registered with the Commission, they continued to publish or to solicit subscriptions for their investment newsletters. These newsletters contain general descriptions of and commentary on the state of the financial markets, short-term and long-term economic forecasts, and general and specific advice on the relative desirability of various investments, including securities.

Because petitioners were not registered, the Commission sought an order from the District Court for the Eastern District of New York enjoining further publication of their newsletters.[1] The Commission made no claim that the information contained in the newsletters is or has been false or misleading; nor did it allege that petitioners traded in securities discussed in the newsletters or used the newsletters as part of any fraudulent or otherwise unlawful conduct.

The District Court refused to enjoin publication of the newsletters. It reasoned that they constitute protected speech that cannot be prohibited; and it construed the statute to require the Commission to allow (and not to revoke) the registration of any publisher who does not also give personal investment advice. The Court of Appeals for the Second Circuit reversed. Reasoning that the publication of newsletters containing specific investment advice constitutes either "commercial speech" or the practice of a profession, the appellate court held that

[1] As it did in this case, the Commission has recently sought injunctions against the publication of other financial newsletters in *SEC* v. *Wall Street Publishing Institute, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,575 (D.D.C. July 12, 1984), appeal docketed, No. 84-5485 (D.C. Cir. Aug. 2, 1984), stay granted, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,635 (D.C. Cir. Aug. 10, 1984); *SEC* v. *Financial News Associates*, No. 84-0878-A (E.D. Va. filed Aug. 29, 1984); *SEC* v. *Options Strategy Associates, Ltd.*, No. 84 Civ. 4316 (S.D.N.Y. filed June 20, 1984).

the Act constitutionally could require a license for such publication, and that such a license constitutionally could be denied on the basis of prior misconduct. Accordingly, the Court of Appeals ordered that an injunction against further publication of petitioners' newsletters be granted.

SUMMARY OF ARGUMENT

The First Amendment principally forbids prior restraints, including the licensing of the press and injunctions against publication. Yet in this case, the Court of Appeals sanctioned a system of licensing a segment of the financial press and the use of an injunction to bar publication of financial newsletters by unlicensed publishers. The Court of Appeals reached this erroneous ruling by failing to treat financial newsletters as speech fully protected by the First Amendment, and consequently by not applying this Court's precedents forbidding prior restraints except on a showing of the most extraordinary and compelling circumstances.

In Part I.A., we show that the publication of financial newsletters constitutes fully protected speech. This Court has long accorded the full protection of the First Amendment to speech on a variety of subjects, including economic and financial matters. Moreover, the fact that financial newsletters provide specific recommendations concerning investments does not diminish their status as fully protected speech. This Court has never distinguished specific information or advice from abstract discussion, and there is no principled basis for such a distinction. If that were the law, numerous books, magazines, and newspaper features that provide specific advice on many subjects also would receive diminished protection.

The Court of Appeals wrongly concluded that the publication of financial newsletters may be treated as commercial or professional activity of a kind that may be subjected to government regulation and licensing, or as "commercial speech" entitled to less than full First Amendment protection. In Part I.B., we show that the

Court of Appeals failed to perceive the distinction between speech on a commercial or financial subject and "commercial speech." This Court has defined the latter term as commercial advertising, solicitation, or the promotion of the speaker's products or services, and nothing else. Moreover, financial newsletters lack the salient characteristics of "commercial speech" that permit its greater regulation. We also show, in Part I.C., that the Court of Appeals erred in treating the licensing of financial newsletter publishers as an instance of the permissible licensing of professionals. For purposes of the First Amendment, there is a critical difference between rendering personalized professional services and engaging in the publishing of impersonal recommendations. Moreover, no support for the Court of Appeals' holding is provided by cases sustaining regulation of "commercial activity" against First Amendment challenges. In all the cases relied upon by the Court of Appeals, the regulation addressed conduct—either in connection with a publishing business or in which speech played an incidental part—not publication itself.

In Part II, we show that the Act's registration requirement and the injunction against publication by an unregistered publisher constitute presumptively invalid prior restraints, which cannot be permitted in the absence of a compelling justification. No such justification exists in this case, where the principal purpose of the registration requirement—the protection of investors from fraud—can be achieved by more narrowly tailored means that do not suppress protected speech. The Commission may prohibit and punish specific instances of fraud committed by publishers of investment advice. But it may not require them to obtain licenses to publish; it may not deny them the right to publish based on prior misconduct; and it may not obtain injunctions against publishers who have done no more than publish without obtaining the Commission's approval.

ARGUMENT

I. FINANCIAL NEWSLETTERS ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The Court of Appeals relied on alternative premises in support of its conclusion that the publication of financial newsletters constitutionally may be licensed, and that publication by unlicensed publishers constitutionally may be enjoined.[2] One was that the investment advice contained in financial newsletters constitutes "commercial speech." 725 F.2d at 900 (Pet. App. A17). The Court of Appeals' preferred basis for its decision, however, was that financial newsletters do not constitute "speech" at all, 725 F.2d at 901 (Pet. App. A17-18), but instead constitute commercial activity that may be regulated or professional conduct that may be licensed. *Id.* We show in this Part that financial newsletters constitute fully protected speech, and that the Court of Appeals' alternative characterizations are incorrect.

A. The First Amendment Fully Protects Financial and Economic Advice.

The Court of Appeals seems to have concluded that because financial newsletters are specialized publications dealing with matters of a financial and economic nature, including specific investment advice, they are entitled to less than the full protection of the First Amendment. This is a crabbed reading of the First Amendment. It is inconsistent with this Court's broad interpretation of the essential coverage of the Amendment, even before and apart from the Court's extension of that coverage to encompass "commercial speech." "The guarantees for speech and press are not the preserve of political expres-

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[2] An investment adviser who renders individualized advice to particular clients, and who also publishes an investment newsletter, must be registered with the Commission on account of his personalized investment advisory business. We do not address that situation in this brief, but confine our discussion to publishers, like petitioners, who engage solely in publishing investment newsletters and who do not also render personalized advice.

sion or comment upon public affairs," *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967); rather, these guarantees "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). Thus, the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02. See also *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967).

These general principles are fully applicable to speech about economic or financial matters. As this Court made plain in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977), its "cases have never suggested that expression about . . . economic . . . matters . . . is not entitled to full First Amendment protection." See also *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945). Indeed, in extending some First Amendment protection to "commercial speech," in the form of advertising by a pharmacist, the Court explained that its holding went beyond the protection theretofore afforded by the Amendment to "speech on a commercial subject." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). "No one," the Court said, "would contend that [the] pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden." *Id.* at 761-62. To the extent, therefore, that financial newsletters discuss economic, financial, or investment matters generally, there can be no doubt that they are fully protected by the First Amendment.

The narrower focus of this case is the provision of investment *advice* by newsletters, in the form of analyses and reports as to the value of specific securities and recommendations regarding purchasing, selling, or holding specific securities. 725 F.2d at 902 (Pet. App. A20).[3] This Court has never suggested, however, that publications containing specific advice are, for that reason, not entitled to full First Amendment protection; and there is no principled basis for so concluding. Speech is not deprived of the full protection of the First Amendment merely because it is practical and potentially useful, rather than being of broad, abstract import. For example, there is "no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute." *Virginia Pharmacy Board*, *supra*, 425 U.S. at 762-63 (citing *Thornhill* v. *Alabama*, *supra*). Cf. *Thomas* v. *Collins*, *supra*, 323 U.S. at 531 ("Great secular causes, with small ones, are guarded.").

Moreover, there is no distinction of constitutional significance between "general" and "specific" investment recommendations—that is, for example, between a prediction of the future course of the stock market as opposed to a recommendation to buy stock in one company rather than another. As Judge Weinstein observed below, there is "no sharp demarcation in the range of economic observation that runs from comment on economic policy to prediction of the performance and recommendation of specific securities." 556 F. Supp. at 1367 (Pet. App. A56). Nor does the fact that readers may act on the basis of specific advice diminish its constitutional protection. See, *e.g.*, *Thomas* v. *Collins*, *supra*, 323 U.S. at 537. For these reasons, the First Amendment does not require that protected speech address itself only to the state of the economy and financial markets in general, while steering clear of stating facts, opinions, or recommendations about particular investments.

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[3] The Court of Appeals stated that it would "leave to another day the question whether a publication dealing only with market indicators generally or making recommendations only as to groups of securities . . . could be barred . . . ." 725 F.2d at 902 n.7 (Pet. App. A20).

If its characterization as concrete advice disentitled speech to some portion of First Amendment protection, then many newspaper features would be vulnerable to government regulation—including editorials telling politicians how to legislate or voters how to vote, and columns containing advice on the subjects of health, careers, education, bridge, gardening, home repair, personal problems, and countless other subjects on which people may wish to be informed and advised. The same would be true of advice provided in books, periodicals, and newsletters.[4] More specifically, if speech is to be given less protection because it is advice on how to spend or save money, then such a restriction would apply not only to advice on investments, but also to advice, criticism, and recommendations in articles on and reviews of restaurants, movies, health care, vacation packages, and consumer products—on which the average American probably spends more than he invests in securities. Yet the courts have uniformly treated such articles and reviews as fully protected speech.[5] Thus,

[4] Thousands of periodicals and newsletters are published in this country, on practically every subject imaginable, including scores of newsletters on the subject of investment alone. For a list and brief descriptions of these publications, see *The Standard Periodical Directory* (8th ed. 1983-84); *Oxbridge Directory of Newsletters* (1983-84).

[5] See *Bose Corp.* v. *Consumers Union*, 508 F. Supp. 1249, 1269-77 (D. Mass. 1981), *aff'd in pertinent part and rev'd in part*, 692 F.2d 189, 194 (1st Cir. 1982), *aff'd*, 52 U.S.L.W. 4513, 4521 (U.S. Apr. 30, 1984) (review of loudspeaker system in *Consumer Reports*); *United Medical Laboratories, Inc.* v. *CBS, Inc.*, 404 F.2d 706 (9th Cir. 1968) (reports on practices of medical testing laboratories); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970) (magazine comments on resort hotel accommodations and services); *General Prods. Co.* v. *Meredith Corp.*, 526 F. Supp. 546 (E.D. Va. 1981) (magazine article on use of wood stoves for heating); *Simmons Ford, Inc.* v. *Consumers Union*, 516 F. Supp. 742 (S.D.N.Y. 1981) (review of electric cars); *Twenty-Five East 40th Street Restaurant Corp.* v. *Forbes, Inc.*, 322 N.Y.S.2d 408 (App. Div. 1971), *aff'd*, 331 N.Y.S.2d 29 (1972) (restaurant review); *Farnsworth* v. *Tribune Co.*, 253 N.E.2d 408 (Ill. 1969) (newspaper report on practices of an

the fact that financial newsletters contain investment recommendations concerning specific securities does not detract from their entitlement to full First Amendment protection.[6]

B. Speech About Financial or Economic Matters, Including Investment Recommendations, Is Not "Commercial Speech."

In the past decade, this Court has found a degree of protection in the First Amendment for a category of

osteopathic physician); *All Diet Foods Distribs., Inc.* v. *Time, Inc.*, 290 N.Y.S.2d 445 (Sup. Ct. 1967) (derogatory implications of photograph in book on nutrition). See also Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 1 (1979).

[6] In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18, *reargument requested*, 52 U.S.L.W. 3937 (U.S. June 26, 1984), this Court is considering whether credit reports provided by Dun & Bradstreet to its subscribers, as speech of a "commercial or economic nature," is entitled to the protection of the rule of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), against presumed or punitive damages in a libel action. We agree with petitioner Dun & Bradstreet that its credit reports are entitled to full First Amendment protection. Even if this Court were to decide that they are not, however, that decision would not dictate the correct decision in this case.

First, the credit reports in *Dun & Bradstreet* are not like the contents of financial newsletters. The credit reports are sold to purchasers on individual order; that is, they are provided only to a "subscriber" who requests a report on the creditworthiness of a particular business. The sale of credit information in response to particularized inquiries can more readily be characterized as commercial activity that may be regulated than the publication of a newsletter containing stock recommendations received by hundreds or thousands of subscribers. Second, even if there were no difference in the character of the communications involved here and in *Dun & Bradstreet*, there remains a difference in the type of regulation involved in the two cases. Here, the government asserts its authority to impose a prior restraint, in the form of a licensing requirement enforceable by an injunction against publication, whereas in *Dun & Bradstreet* the issue is what damages are permissible. The availability of presumed or punitive damages has a chilling effect on protected speech; but it does not impose the absolute ban of a prior restraint.

speech that it has labeled "commercial speech." On repeated occasions, however, the Court has noted that commercial speech will not necessarily be entitled to the same level of protection as more traditionally protected speech. See, *e.g.*, *Bolger* v. *Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4962 (U.S. June 24, 1983); *Virginia Pharmacy Board, supra*, 425 U.S. at 771-72 n.24. Accordingly, the Court of Appeals thought it possible to sustain the Act's registration requirement, and an injunction against publication by an unregistered publisher, by treating investment newsletters as commercial speech.

For this Court to adopt the Second Circuit's view would be an expansion of the scope of the commercial speech doctrine totally at odds with this Court's prior decisions. As this Court has applied the term to date, "commercial speech" has meant commercial advertising, promotion, or solicitation, and nothing more.[7] Despite this exclusive focus, the Court of Appeals opined that this Court has not "limited commercial speech solely to product or service advertising." 725 F.2d at 900 (Pet. App. A17). The Court of Appeals relied primarily on the fact that while this Court originally defined commercial speech as speech that does "no more than propose a commercial transaction,"[8] it also, and more recently,

[7] See *Bolger* v. *Youngs Drug Prods. Corp.*, *supra* (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (1982) (advertising legal services); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) (commercial advertising on billboards); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980) (promotional advertising for electric power); *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (optometrists' solicitation of patronage by use of trade names); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (in-person solicitation of paying clients by lawyer); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (advertising legal services); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) (advertising houses for sale); *Virginia Pharmacy Board, supra* (advertising by pharmacists).

[8] See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

has described commercial speech as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561 (1980), and as "speech . . . linked inextricably to commercial activity." *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979).[9]

We submit that these formulations, when properly read in context, do not and were not intended to broaden this Court's basic definition of commercial speech. Rather, it seems clear that in both *Central Hudson* and *Friedman*, the Court employed a new formulation because it found itself confronted with promotional advertising that nevertheless could not be said to "propose" a particular "commercial transaction." Thus, the utility's promotion of the use of electricity in *Central Hudson*, and the optometrists' use of trade names to solicit patronage in *Friedman*, both served to promote the sale of the speakers' products or services. Moreover, the language employed in *Central Hudson* plainly cannot be given its broadest literal interpretation, which also would cover, for example, discussion of the merits of raising taxes or school teachers' salaries, joining a union, or imposing import quotas on foreign goods. And the Court in *Friedman* did not *define* commercial speech as "speech . . . linked inextricably to commercial activity"; rather, it *observed* that "commercial speech is linked inextricably to commercial activity"—because, after all, commercial speech proposes or promotes a commercial trans-

[9] The Court of Appeals also noted that commercial speech cannot be equated with advertising, since fully protected speech that happens to appear in the form of a paid advertisement nevertheless retains its fully protected status. 725 F.2d at 900 (Pet. App. A17); see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). We agree that "[i]f commercial speech is to be distinguished, 'it must be distinguished by its content,'" not by its form, *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 363, but the content that makes something "commercial speech" is promotion of one's own commercial products or services, and nothing else.

action. In short, this Court has not departed from the proposition that there must be a commercial, promotional element in speech—even if implicit or derived from the context—to make it "commercial speech," see *Bolger* v. *Youngs Drug Products Corp.*, *supra*, 51 U.S.L.W. at 4963 n.13, and this Court has not applied that definition to any other type of communication.[10]

Financial newsletters fall outside this definition of "commercial speech." While such newsletters may recommend the purchase of particular securities, the publisher of the newsletter does not sell securities or receive a commission on such sales.[11] As long as the speaker does

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[10] To be sure, this Court has held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger* v. *Youngs Drug Prods. Corp.*, *supra*, 51 U.S.L.W. at 4963 (quoting *Central Hudson Gas & Elec. Corp.*, *supra*, 447 U.S. at 563 n.5). But the premise of this statement is that the speaker is the seller of the product in question and that the comments on public issues "are made solely in the context of commercial transactions," 51 U.S.L.W. at 4963, see *Central Hudson*, *supra*, 447 U.S. at 562-63 n.5; its rationale is that promotional advertising cannot attain a higher level of constitutional protection by being sandwiched between "references to public issues." 51 U.S.L.W. at 4963. The element of promotion of one's own products or services remains, and is critical to the commercial speech characterization.

[11] Of course, the publisher of a newsletter profits by the sale of subscriptions. This in no way diminishes his entitlement to First Amendment protection, however, since speech "is protected even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Board*, *supra*, 425 U.S. at 761. See also *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 363. Otherwise, there would be no First Amendment protection for any book, movie, magazine, or newspaper that is not given away free of charge, as this Court often has pointed out. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, *supra*, 413 U.S. at 384-85; *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966); *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 266; *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952).

not propose a commercial transaction between himself and the reader or promote the sale of his own products or services, his expression is not "commercial speech."

Moreover, financial newsletters lack the salient characteristics of commercial speech that make appropriate "a different degree of protection." *Virginia Pharmacy Board*, *supra*, 425 U.S. at 771-72 n.24. First, the accuracy of such speech is more easily verifiable by its disseminator than, for example, news reporting or political commentary, "in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Id.* Since newsletters comment on securities issued and sold by others, and consist of unverifiable opinions as much as facts, this characteristic is lacking.

Similarly, this Court has focused on the "hardiness" of commercial speech, because speech motivated by the desire to make a sale is less likely to be chilled than other speech. *Id.* Again, this observation has no bearing on reporting on investments that the publisher is not attempting to sell, any more than it would be applicable to publishers of magazines, books, or daily newspapers, who also have an interest in maximizing revenues through subscriptions or sales. Thus, we submit, not only does the Court's traditional definition of "commercial speech" not fit petitioners' newsletters, but the salient characteristics of commercial speech, which allow its greater regulation, also are absent.[12]

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[12] A third characteristic of commercial speech that permits its greater regulation is that it generally is not urgent or timely. The information and recommendations in investment newsletters, on the other hand, are valuable either now or never. Accordingly, it would be inappropriate to apply to financial newsletters the prescreening requirements that sometimes apply to commercial speech.

Finally, the incentive to use commercial speech in a misleading way is also absent in the case of newsletters. The publisher of an

C. Prohibiting the Publication of Financial Newsletters by Unregistered Publishers Is Not Like the Regulation of Commercial Activity or the Licensing of Professionals.

The Court of Appeals' alternative and "preferred" basis of decision was that the publication of financial newsletters without a license constitutionally may be prohibited under decisions sustaining the regulation of commercial activity and the licensing of professionals. Neither line of cases is applicable, however.

1. *Regulation of commercial activity.*

The cases identified by the court below as permitting the "regulation of commercial activity" stand for two different, but related, propositions. One line of cases establishes that a business is not immune from "generally applicable economic regulations" simply because it is part of the press. *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983). A second line of cases demonstrates that "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), *quoted in Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

Publishing is, of course, a commercial activity, in that it is a business carried on for profit. But publishing itself, without more, cannot be made unlawful without clashing directly with the First Amendment. For purposes of First Amendment analysis, therefore, "commercial activity" that may be regulated and "publishing" as such are mutually exclusive categories. When a publisher engages in some business or commercial practices apart from just publishing, however, that conduct may be regulated or prohibited just as it would be if engaged in by any other business. Thus, for example, a newspaper is subject to the federal antitrust laws, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-40 (1969), state laws against restraint of trade, *Giboney* v. *Empire Storage & Ice Co.*, *supra*, the federal labor laws, *Associated Press* v. *NLRB*, 301 U.S. 103, 132-33 (1937), and the federal minimum wage laws, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-93 (1946). Indeed, these laws are applicable to any newsletter publisher that comes within their respective terms. In each of these cases, however, what is regulated is some conduct other than publishing itself, and the regulation therefore "ends in no restraint upon expression or in any other evil outlawed by [the First Amendment's] terms and purposes." *Id.* at 193 & n.8.

Similarly, there is no support for the Court of Appeals' holding in this Court's acknowledgment that communications may be regulated without offending the First Amendment when they merely further an unlawful course of conduct. See *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 456. In each of the examples cited by the Court in *Ohralik*—including the exchange of inside information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), the issuance of corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969)—the subject of the regulation properly may

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investment newsletter—like any publisher of newspapers, books, or magazines—likely will sell more subscriptions if its reporting and recommendations prove informative, useful, and reliable than if they do not, since it is "selling" speech itself, not using speech to sell some other product.

be characterized as "commercial activity," in which speech is simply a component. *Ohralik*, *supra*, 436 U.S. at 456. The same cannot be said of publishing investment recommendations, without more.

2. *Licensing of professionals.*

The Court of Appeals also relied on cases sustaining the regulation and licensing of professionals. 725 F.2d at 901 (Pet. App. A18-19). The court reasoned that if the States may require the licensing of professionals—including, most notably, lawyers and doctors—then Congress similarly may require the licensing of investment advisers, including publishers of investment advice. This view overlooks the fact that the First Amendment carves out the occupation or profession of publishing from among other professions and immunizes it from licensing or similar requirements. It is necessary to determine, therefore, whether financial newsletter publishers are engaged in the regulable profession of investment advising or the immunized profession of publishing.

The absence of individualized, personal interaction between the publisher and his subscribers distinguishes publishing a newsletter from engaging in a regulable profession. This distinction was fully appreciated by the District Court and the dissenting judge in the Court of Appeals. See 725 F.2d at 903-04 (Pet. App. A23-24) (Brieant, J., dissenting); 556 F. Supp. at 1365, 1369 (Pet. App. A62) (Weinstein, J.). First, the publisher of an investment newsletter has no authority over the funds of clients. Thus, a substantial component of an investment adviser's business that involves conduct—in the form of initiating securities transactions—is entirely lacking in the case of a newsletter publisher. Second, the newsletter publisher has no information about or familiarity with the individual circumstances of his subscribers, and does not tailor his advice to those circumstances. As a corollary, his subscribers cannot delegate decision-making authority to him, nor rely on his advice in the

way that a client in a one-to-one relationship with his investment adviser relies on the latter's advice. Thus, there is a gap between the publisher's expression of views and the subscriber's application of those views to his own circumstances. That gap, we submit, breaks the personal nexus between adviser and client that is the quintessential element of any professional relationship, including one involving an investment adviser.

Judge Brieant, dissenting below, concisely described the distinction between publishing advice and opinion, on the one hand, and engaging in the practice of a profession, on the other:

> "The expression of opinion [in a financial newsletter] is poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.*, 'Prevention Magazine') is from the practice of medicine, or a book advising how to avoid probate is remote from the practice of law. The latter require a medical or law degree and a license, while the former are protected First Amendment expression." 725 F.2d at 903 (Pet. App. A23-24).

Numerous decisions concerning the licensing of professionals bear out this distinction. In the leading case of *New York County Lawyers Association* v. *Dacey*, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967), the New York Court of Appeals held, by adopting the dissenting opinion in the Appellate Division, that authors or publishers of books giving estate planning advice, who are not members of the Bar, are not engaged in the unauthorized practice of law; and that, under the First Amendment, they may not be enjoined from publishing such advice. The opinion explained:

> "Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential element of legal practice—the representation and advising of a particular person in a particular situation." 283 N.Y.S.2d 984, 998 (App. Div. 1967).

The *Dacey* distinction has been found persuasive in every State but one in which the question has been considered.[13]

It therefore would be erroneous, and in conflict with the First Amendment, to characterize the publishing of an investment newsletter as the practice of a profession. Moreover, this would be a dangerous precedent. If giving advice or making recommendations by impersonal publication is deemed to be engaging in a profession—or, indeed, in any occupation for which a license may be required—then government similarly may require a license to publish books or pamphlets giving advice on countless subjects. The extreme nature of such a result demonstrates the incorrectness of the underlying premise.

II. IN PROHIBITING THE PUBLICATION OF FINANCIAL NEWSLETTERS WITHOUT A LICENSE, THE ACT IMPOSES AN UNCONSTITUTIONAL PRIOR RESTRAINT.

As we have just demonstrated, financial newsletters contain speech that is fully protected by the First Amendment. The Advisers Act, however, makes it "unlawful for any investment adviser, unless registered . . . , to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser." 15 U.S.C. § 80b-3(a). For purposes of the Act, an "investment adviser" is "any person who, for compensation, engages in the business of advising others, either directly or *through publications or writings*, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who . . . issues or promulgates analyses or re-

[13] See *Florida Bar* v. *Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *State ex rel. Schneider* v. *Hill*, 573 P.2d 1078 (Kan. 1978); *State Bar* v. *Cramer*, 249 N.W.2d 1 (Mich. 1976); *In re Thompson*, 574 S.W.2d 365 (Mo. 1978); *State* v. *Winder*, 348 N.Y.S.2d 270 (App. Div. 1973); *Oregon State Bar* v. *Gilchrist*, 538 P.2d 913 (Or. 1975). But see *Palmer* v. *Unauthorized Practice Comm.*, 438 S.W.2d 374 (Tex. Civ. App. 1969).

ports concerning securities . . . ." *Id.* § 80b-2(a)(11) (emphasis added). The Act contains several exclusions from its definition of "investment adviser," including one for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." *Id.* § 80b-2(a)(11)(D). This exclusion has been construed narrowly, however, and is applicable "only where, based on the content, advertising material, readership, and other relevant factors, a publication is not primarily a vehicle for distributing investment advice." SEC Investment Advisers Act Release No. 563, 42 Fed. Reg. 2953 (Jan. 10, 1977) (citing *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970)).

Thus, unless the "bona fide newspaper" exclusion is applicable, a publisher must register with the Commission as an investment adviser in order to publish investment advice or reports concerning securities. The Act authorizes the Commission to enforce this ban on publication by unregistered publishers either by applying to a court for an injunction against publication, 15 U.S.C. § 80b-9(e)—the route chosen by the Commission in this case—or by seeking criminal penalties for publishing in violation of the statute. *Id.* § 80b-17. In either case, as we now show, the Act's prohibition of publication by those not registered with the Commission imposes a prior restraint on protected speech, which "'comes to this Court bearing a heavy presumption against its constitutional validity.'"[14] *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co.* v. *United States*, *supra* (quoting *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415,

[14] See generally Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955); Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409 (1983).

419 (1971)). The Commission cannot sustain that heavy burden in this case.

A. The Prior Restraint Imposed by the Act's Registration Requirement Cannot Be Justified.

The term "prior restraint" is used loosely "to embrace a variety of different situations." Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 655 (1955). The registration requirement of the Act presents "[t]he clearest form of prior restraint," in that, as applied to financial newsletters, it "undertakes to prevent future publication . . . without advance approval of an executive official." *Id.* Thus, a publisher can be prosecuted or enjoined from publishing not because of the unprotected content or manner of his speech, but merely because he did not procure a license from the government in advance. *Id.* See also Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 417-18 (1983).

The Act's registration requirement operates as an unconstitutional prior restraint in two ways. First, it requires *all* financial publishers to obtain licenses to publish, unless the "bona fide newspaper" exclusion is applicable.[15] Second, the Act authorizes the Commission to refuse to allow registration by some prospective publishers, like

[15] The "bona fide newspaper" exclusion does not save the Act from its constitutional infirmity because, as interpreted, it fails to exclude newsletters and other constitutionally protected publications from the Act's coverage. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978). Freedom of the press, as a "fundamental personal right," is not "confined to newspapers and periodicals," *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938), and it certainly is not limited to "bona fide newspaper[s], news magazine[s] or business or financial publication[s] of general and regular circulation"—whatever that phrase may mean. Rather, "[t]he press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 452. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972).

petitioners, on account of their statutory disqualification. Those publishers do not even have the option of procuring a license in order to publish lawfully. While only the latter situation is directly involved in this case, we here address both applications of the statute.

1. *The Act unconstitutionally compels financial publishers to register with the government.*

To comply with the Act's registration requirement, a publisher must submit extensive information to the Commission.[16] He then must wait for approval before publishing. Even when there is no question of disqualification, the Commission need not act on an application for 45 days; and if the Commission decides to investigate further, it can take up to seven months to act on the application. 15 U.S.C. §§ 80b-3(c)(2)(A) & (B).

These provisions, which require newsletter publishers to register with the government prior to publication, are invalid under the First Amendment. As this Court has long recognized, the freedom to publish written materials without identifying oneself to the government is at the heart of the Amendment.[17] In *Talley* v. *California*,

[16] This information includes the names of the publisher and his or its partners or officers, as well as their address and number of employees; the education and business affiliations of the publisher and his or its partners or officers for the past ten years; a statement of the nature of the business of the publisher, including the manner of giving advice and rendering analyses or reports; and a balance sheet certified by an independent public accountant. 15 U.S.C. §§ 80b-3(c)(1)(A)-(D).

[17] Of course, the press is not immune from regulations that are applicable to businesses generally and that may include a duty to file information with the government. See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, *supra*, 460 U.S. at 586-87 n.9 (nondiscriminatory taxation laws) (dictum); *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 192-93 (Fair Labor Standards Act). But the Court has never intimated that publishers constitutionally may be required to identify themselves solely with respect to the fact of publication.

362 U.S. 60 (1960), the Court struck down a city ordinance that forbade the public distribution of hand-bills unless they contained the name and address of the printer and the distributor, on the ground that "such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. Similarly, *Thomas* v. *Collins*, 323 U.S. 516 (1945), "held unconstitutional a prior restraint in the form of a registration requirement for labor organizers." *Buckley* v. *Valeo*, 424 U.S. 1, 81 (1976). Even though registration in *Thomas* would have been granted as a matter of course and used solely for identification purposes, the Court noted that as long as nothing more than speech is involved, any registration requirement, even if ministerial, is "quite incompatible with the requirements of the First Amendment." 323 U.S. at 540.[18] Accordingly, except for situations involving speech intertwined with conduct,[19] or occurring in special settings,[20]

[18] See also *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (1913). In that case, this Court upheld application of the Post Office Act's registration requirement to newspapers on the ground that the Act required such registration only as a prerequisite to enjoyment of the privilege of second class mail rates. The implication is clear that the requirement would have been held unconstitutional had it applied to newspapers distributed through the regular mails.

[19] For example, informational licensing may be required in order to engage in solicitation. See *Village of Schaumburg* v. *Citizens For a Better Environment*, 444 U.S. 620, 637-38 (1980); *Cantwell* v. *Connecticut*, 310 U.S. 290, 306 (1940). As the lower courts have recognized, solicitation stands on a different constitutional footing from the publishing and distribution of printed literature. See, *e.g.*, *International Society for Krishna Consciousness* v. *City of Houston*, 689 F.2d 541, 556 (5th Cir. 1982); *Rosen* v. *Port of Portland*, 641 F.2d 1243, 1251 n.17 (9th Cir. 1981).

[20] The Court indicated in *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 619 (1976), that a state could require informational registration of persons engaged in door-to-door canvassing or soliciting, on the ground that there is no absolute First Amendment right to "enter on the private premises of another and knock on a door for any purpose."

or where an overriding national interest in disclosure has been demonstrated,[21] this Court has not sanctioned even ministerial licensing of the written press as a precondition to the right to publish.[22]

When tested against this background, the registration provisions of the Advisers Act—which call for substantial information in addition to the publisher's name and address and permit a prolonged delay in the registration process—cannot stand as applied to financial newsletter publishers. Such publishers are engaged in pure speech, not solicitation. They communicate with willing listeners, and do not intrude upon private property. Any interests served by the requirement—including, presumably, assistance in investigating potential fraud—fall far short of those overriding national interests for which compelled registration has been approved.

2. The right to publish may not constitutionally be denied on grounds of prior misconduct.

The Commission has the authority, under 15 U.S.C. §§ 80b-3(c) and (e), to deny or revoke registration if it

[21] For example, informational registration requirements have been upheld where necessary to safeguard the functioning of our national institutions, see *Burroughs* v. *United States*, 290 U.S. 534 (1934) (Federal Corrupt Practices Act); *United States* v. *Harriss*, 347 U.S. 612 (1954) (Federal Regulation of Lobbying Act), or where national security or violence were involved, see *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928).

[22] The principle of *Talley* and *Thomas*—that government cannot require the registration of persons who seek to do no more than speak—has been applied in other settings by the Courts of Appeals. For example, the First Circuit has struck down city ordinances requiring newspaper vendors on city sidewalks to obtain licenses in advance, even though such licenses were automatically granted by city authorities. *Wulp* v. *Corcoran*, 454 F.2d 826, 834 (1st Cir. 1972); *Strasser* v. *Doorley*, 432 F.2d 567 (1st Cir. 1970). Similarly, the Ninth Circuit has held that persons seeking to do no more than distribute written literature in public facilities cannot be required to register with governmental authorities. *Rosen* v. *Port of Portland*, *supra*, 641 F.2d at 1250-51.

finds that the applicant or registrant is subject to a statutory disqualification. In the instant case, the Commission deregistered Lowe Management and barred Lowe from association with any investment adviser based on Lowe's state court convictions and certain violations of the Act's reporting and disclosure requirements. *In re Lowe Management Corp.* [1981 Transfer Binder), Fed. Sec. L. Rep. (CCH) ¶ 82,873 (May 11, 1981). Thus, petitioners cannot obtain the license that is the prerequisite to publishing lawfully.[23]

The purpose of the disqualification provision is the protection of the investing public from securities fraud and related infractions. See generally *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).[24] The Act's disqualification provision attempts to promote the government's interest in protecting investors by preventing the giving of *any* investment advice by persons who, in Congress' view, may be more likely than others to engage in fraudulent practices. But "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), *quoted in Village of Schaumburg* v. *Citizens For a Better Environment*, 444 U.S. 620, 637 (1980). Even on the assumption that the prevention of securities fraud is " 'a sub-

[23] The Court of Appeals stated that Lowe is not prohibited "from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer." 725 F.2d at 902 (Pet. App. A20). This does not affect the constitutionality of the restraint imposed, however, because "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

[24] For example, investment recommendations may constitute part of a fraudulent "scalping" scheme, in which a person (whether a newsletter publisher or personal adviser) "purchas[es] shares of a security for his own account shortly before recommending that security for long-term investment and then immediately sell[s] the shares at a profit upon the rise in the market price following the recommendation." *SEC* v. *Capital Gains Research Bureau, Inc., supra*, 375 U.S. at 181.

ordinating interest which is compelling,' " *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978) (citations omitted), the government must "employ means 'closely drawn to avoid unnecessary abridgment . . . .' " *Id.* (quoting *Buckley* v. *Valeo*, *supra*, 424 U.S. at 25.

Denying the right to publish is not a closely drawn, narrowly tailored means of dealing with the problem of potential securities fraud. On several occasions this Court has struck down other permit requirements for which the government offered a similar justification. In *Schneider* v. *State*, 308 U.S. 147 (1939), a municipality urged the prevention of fraud as its justification for prohibiting leafletting and soliciting without a permit. While "[c]onceding that fraudulent appeals may be made in the name of charity and religion," the Court nevertheless held:

> "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Id.* at 164.

See also *Village of Schaumburg*, *supra*, 444 U.S. at 636-37; *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). As the Court said in *Schaumburg*, "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637.

Nor is the Act's insufficient justification aided by the fact that licenses are denied on the basis of prior misconduct involving fraud or violation of the securities laws. As this Court held in rejecting a similar argument in *Kunz* v. *New York*, 340 U.S. 290, 294-95 (1951):

> "The court below has mistakenly derived support for [upholding the denial of a license] from the evidence . . . that appellant's religious meetings

had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. 'In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment.' *Near* v. *Minnesota*, 283 U.S. 697, 715 (1931). We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize. We are here concerned with suppression—not punishment."

Based on *Kunz* and *Near*, licensing schemes have uniformly been held unconstitutional when they provide that "future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct." *Universal Amusement Co.* v. *Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (*en banc*), *aff'd*, 445 U.S. 308 (1980).[25]

Sufficient remedies short of prior restraint are available and in place to deal with the kinds of securities fraud by publishers with which the Commission is concerned.[26] It is unlawful for publishers to act secretly as publicity agents, paid by persons already holding positions in recommended stocks. "[S]ensationalists who promise miracles in the market which they can hardly deliver" may be dealt with by means of restrictions on deceptive advertising. To the extent that "out-and-out tipsters" falsely claim to have inside information, in order to dupe subscribers into investing in stocks in which they hold positions or are otherwise personally interested, such deceit may be punished or subjected to civil lia-

[25] See also *Fernandes* v. *Limmer*, 663 F.2d 619, 629-30, 632 (5th Cir. 1981); *Entertainment Concepts, Inc., III* v. *Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *International Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809, 832-33 (5th Cir. 1979); *Collin* v. *Chicago Park District*, 460 F.2d 746, 753-54 (7th Cir. 1972); *San Juan Liquors, Inc.* v. *City of Jacksonville*, 480 F. Supp. 151, 153-54 (M.D. Fla. 1979); *Bayside Enterprises, Inc.* v. *Carson*, 470 F. Supp. 1140, 1142-45 (M.D. Fla. 1979).

[26] See Brief for Appellant at 19-23, *SEC* v. *Lowe*, 725 F.2d 892 (2d Cir. 1984).

bility. As this Court held in *Schneider* v. *State*, *supra*, 308 U.S. at 164, the possibility that these remedies may be "less efficient and convenient" than a prior restraint is precisely the argument that is rejected by the First Amendment. Congress may not prohibit all publication that it suspects may result in problems that may be dealt with more narrowly, if and when they arise.[27]

B. The Publication of Financial Newsletters by Unregistered Publishers Cannot Be Enjoined.

The use of an injunction to enforce the Act's registration requirement also is unconstitutional. Because "it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication," *Near* v. *Minnesota*, *supra*, 283 U.S. at 713, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 725-26 (Brennan, J., concurring). Instead, if the government is to obtain an injunction against publication, it must prove that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (White, J., concurring). *See Organization For a Better Austin* v. *Keefe*, *supra*; *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977). See also *Bantam Books, Inc.* v. *Sullivan*, *supra* (informal system of prior re-

[27] A ruling that the Act's registration requirement, as applied to financial newsletter publishers, violates the First Amendment would not prevent the Commission from enforcing the antifraud provisions of the Advisers Act, 15 U.S.C. § 80b-6. Publishers of financial newsletters to whom the "bona fide newspaper" exclusion is inapplicable would remain within the Act's definition of "investment adviser," and therefore would remain subject to the Act's requirements that apply to investment advisers who are exempt from registration, including the antifraud provisions. To the extent that the Commission used the antifraud provisions to attack specific fraudulent conduct (but not pure speech)—as it did in *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*—its application to financial publishers probably would not be constitutionally objectionable.

straint held unconstitutional). "[O]nly governmental allegations and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 726-27 (White, J., concurring).

The Commission's interests fall far short of meeting this exacting standard. The justification for an injunction is derived from, and rises no higher than, the justification for the Act's registration and disqualification provisions. As we have just shown, however, these provisions are overly broad means of furthering the Commission's legitimate interest in preventing and punishing securities fraud. Since these provisions themselves cannot withstand constitutional scrutiny, as applied to publishers, it follows *a fortiori* that publication by an unregistered published may not be enjoined.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

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